

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the Application of Grain Belt Express)
Clean Line LLC for Approval of its Acquisition by) No. EM-2019-0150
Invenergy Transmission LLC)

**GRAIN BELT EXPRESS CLEAN LINE LLC’S OPPOSITION TO INTERVENORS’
“MOTION TO COMPEL GRAIN BELT TO ANSWER DISCOVERY REQUEST”**

Grain Belt Express Clean Line LLC (“Grain Belt Express” or “Company”), by and through counsel, hereby respectfully submits the following opposition to Intervenor Joseph and Rose Kroner’s (“Intervenors” or “the Kroners”) “Motion to Compel Grain Belt to Answer Discovery Request.”

INTRODUCTION

Subject to its objections, Grain Belt Express admitted the accuracy of 10 copies of documents referenced in Intervenor’s 11 Requests for Admission—all of which were prepared, filed, and/or sponsored by Grain Belt Express itself. Such documents included: portions of the transcript in Case No. EA-2016-0358 (“CCN Proceeding”) containing testimony of Invenergy witness Kris Zadlo and Grain Belt Express witness David Berry; Grain Belt Express’s own initial post-hearing brief and reply brief filed in the CCN Proceeding; portions of the testimony of Grain Belt Express witness Prescott Hartshorne filed in the CCN Proceeding; portions of the testimony of Grain Belt Express witness Michael Skelly filed in Case No. EA-2014-0207 (“2014 CCN Proceeding”); responsive pleadings filed by Grain Belt Express in two past Sunshine Law cases brought by the Missouri Landowners Alliance (“MLA”) against the Caldwell and Monroe County Commissions; and Grain Belt Express’s appellate reply brief filed before the Missouri Court of Appeals, Eastern District.

However, Intervenor’s Request No. 8 seeks for Grain Belt Express to admit the accuracy of a copy of “the cover page and page i of the ‘Substitute Brief of Intervenor Missouri Landowners Alliance in Support of Respondent PSC and in Response to Substitute Brief of Appellant Grain Belt Express Clean Line, LLC [sic]’, filed in Supreme Court Case No. SC96993, which case was heard on transfer from the Eastern District of the Missouri Court of Appeals Case No. ED105932.” Grain Belt Express objected that this Request was “not relevant or reasonably calculated to lead to the discovery of admissible evidence in this proceeding,” and stated it was unable to admit the accuracy of the two pages of MLA’s appellate brief because they were not prepared or filed by Grain Belt Express.

As discussed below, there are two reasons that Intervenor’s Motion must be denied: (1) the two-page portion of an appellate brief, filed by a different intervenor (MLA, not the Kroners) in a different proceeding, is logically and legally irrelevant to this proceeding and thus fails to meet the threshold requirement of Missouri Supreme Court Rule 56.01(b)(1); (2) Intervenor’s Request for Admission No. 8 is a procedurally improper use of Rule 59.01.

ARGUMENTS & AUTHORITIES

I. Intervenor Failed to Meet their Burden to Establish Relevance for Request No. 8.

Before reaching the substance of any discovery request, the Rules require that the Commission first determine whether relevance has been shown by the party seeking the discovery.¹ Rule 56.01(b)(1) provides that “[p]arties may obtain discovery regarding any matter, not privileged, that is **relevant** to the subject matter involved in the pending action,” and explicitly specifies that “[t]he party seeking discovery **shall bear the burden of establishing relevance.**” (emphasis added). E.g., State ex rel. Kander v. Green, 462 S.W.3d 844, 852 (Mo. Ct. App. W.D.

¹ 4 CSR 240-2.090(1) provides that discovery in matters before the Commission may be obtained by the same means and under the same conditions as in civil actions in a circuit court.

2015) (“Because Reeves has pointed to no factual issue for which her proposed discovery request has any relevance or is ‘reasonably calculated to lead to the discovery of admissible evidence,’ she has failed to meet her burden to establish a right to the discovery. Rule 56.01(b)(1).”); Diehl v. Fred Weber, Inc., 309 S.W.3d 309, 323 (Mo. Ct. App. E.D. 2010) (“The party seeking discovery has the burden of establishing the relevance of the sought-after materials.”).

Discovery is “logically relevant if it tends to make the existence of a material fact more or less probable.” Jackson v. Mills, 142 S.W.3d 237, 240 (Mo. Ct. App. 2004). Legal relevance “refers to the process of weighing the probative value of the evidence against the dangers to the opposing party of unfair prejudice, confusion of the issues, undue delay, waste of time, cumulativeness, or violations of confidentiality,” and determining whether the probative value of the sought discovery outweighs its prejudicial effect. Id.

Intervenors assert that “they will argue in this case that the Commission does not have the jurisdiction or statutory authority under Section 393.190 to approve the sale of Grain Belt to Invenergy,” by in turn arguing that “in the appeal of the CCN case (EA-2016-0358) the Missouri Supreme Court implicitly ruled that the consents from County Commissions do not amount to ‘franchises.’” This contention fails to establish logical relevance to any material fact in this proceeding, and any probative value well outweighs its prejudicial effect in causing confusion of the issues, undue delay, and time waste in this acquisition proceeding.

First, as Intervenors admit, the Missouri Supreme Court explicitly stated that “MJMEUC and MLA’s briefs assert several points on appeal. The Commission filed a motion to dismiss MLA’s appeal, which was taken with the case. Because this Court’s review of Grain Belt’s points on appeal is dispositive, **this Court does not reach the claims raised by MJMEUC or MLA.**” Grain Belt Express Clean Line, LLC v. PSC, 555 S.W.3d 469, 474 n.5 (Mo. en banc 2018)

(emphasis added). Thus, the Missouri Supreme Court has already made crystal-clear that it did not even reach the merits of, much less “implicitly rule” as to, any “points on appeal” or “claims raised by . . . MLA.” Intervenors fail to establish relevance here because the plain language of the Missouri Supreme Court’s decision is fully dispositive of Intervenors’ desired argument.

Second, even if the Missouri Supreme Court somehow ruled by silence as to any appellate issue raised by MLA, MLA **never argued** whether a Mo. Rev. Stat. § 229.100 county road-crossing assent, “franchise,” or “license” was “personal property” under the definition of “electric plant,” pursuant to Mo. Rev. Stat. § 386.020(14). Instead, MLA argued that “the second sentence of Subsection 2 of § 393.170, supra, expressly requires that the county franchises issued under § 229.100 must be secured by the utility before the PSC may issue a CCN.” Grain Belt Express Clean Line, LLC v. PSC, Substitute Brief of Intervenor Missouri Landowners Reliance, 2018 WL 1694893 (Mo., March 29, 2018). In other words, MLA’s appellate argument regarding § 393.170.2 before the Missouri Supreme Court has absolutely no bearing on the meaning of “electric plant” and “personal property” under § 386.020(14), or the Commission’s jurisdiction in this proceeding pursuant thereto. Intervenors thus cannot show the logical or legal relevance of such argument to this proceeding.

Third, Intervenors also fail to explain how an admission as to the accuracy of only the cover page and table of contents of MLA’s appellate brief would then allow Intervenors to import any remaining portion of such brief into this case. E.g., Wheelhouse Marina Real Estate, L.L.C. v. Bommarito, 284 S.W.3d 761, 768 (Mo. Ct. App. S.D. 2009) (“The ‘best evidence’ rule is that generally the terms of a document must be proved by production of the original document” and applies “when the evidence is offered to prove the terms or contents of a writing or recording.”) (quotations omitted).

Therefore, Intervenors have failed to carry their threshold burden of establishing relevance pursuant to Rule 56.01(b)(1), and are as a result not entitled to the discovery requested in their Request for Admission No. 8. In addition, Intervenors' attempt to re-litigate the Commission's jurisdiction—which was already fully addressed in the CCN Proceeding and the Commission's Report and Order on Remand—could only cause a prejudicial waste of time, unnecessary delay, and confusion of the otherwise straightforward issues in Joint Applicants' acquisition application. For this reason alone, Intervenors' Motion should be denied.

II. Intervenors' Request No. 8 Is Improper.

While Rule 59.01 permits parties to seek admissions or denials as to the “genuineness” of documents, Grain Belt Express explained in its written objection to Request No. 8 and in the April 11, 2019 teleconference held by Judge Woodruff that it currently has no employees and there are no Company individuals with personal knowledge of MLA's appellate brief filed before the Missouri Supreme Court. And, Grain Belt Express's counsel in this case were not involved in that appeal. Further, it is questionable under the Missouri discovery rules whether a party's legal counsel could properly admit the genuineness of a document on behalf of a party that otherwise lacks personal knowledge thereof. Mo. Sup. Ct. R. 59.01(a) (“a party may serve upon any other **party** a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 56.01(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request.”) (emphasis added). Thus, Grain Belt Express is unable to admit or deny the relevance of the two-page portion of MLA's brief referenced in Request No. 8.

Moreover, Intervenors do not need to abuse Rule 59.01 in order to force Grain Belt Express to admit the “genuineness” of two pages of MLA's brief in another proceeding. Intervenors have

not explained why they themselves did not file testimony in this proceeding authenticating such brief, or a records custodian affidavit as permitted pursuant to Mo. Rev. Stat. § 490.680, or the like. Further, Intervenors have not explained why they are unable to seek administrative or official notice of MLA's appellate filing before the Missouri Supreme Court. Indeed, "[r]ecords of proceedings of any court of this state contained within any statewide court automated record-keeping system established by the supreme court shall be received as evidence of the acts or proceedings in any court of this state without further certification of the clerk, provided that the location from which such records are obtained is disclosed to the opposing party." Mo. Rev. Stat. § 490.130. Simply put, there are many other evidentiary vehicles for Intervenors to utilize, which do not involve improperly demanding that an employee-less party "admit the genuineness" of the opposing party's irrelevant brief filed in a separate proceeding before a separate tribunal.

Intervenors' misuse of Rule 59.01 under these circumstances should not be permitted, especially when Intervenors are not foreclosed to other methods by which to seek introduction of their desired evidence into this case's record.

CONCLUSION

Based on the foregoing, Grain Belt Express respectfully requests that the Commission deny Intervenors' Motion in its entirety.

